

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & Affidavit of Mailing

77-1310

To be argued by
ZACHARY W. CARTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1310

UNITED STATES OF AMERICA,

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Appellee,

—against—

FABIO GALLEG0-HENAO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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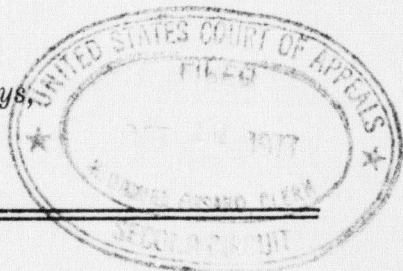




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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1310

UNITED STATES OF AMERICA,

—against—

FABIO GALLEG0-HENAO,

Appellee,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Fabio Gallego-Henao appeals from a judgment entered on July 15, 1977 in the United States District Court for the Eastern District of New York (Jacob Mishler, *Ch. J.*) convicting him, after a jury trial, of violations of the federal narcotics laws. Appellant was charged in three counts of a four count indictment with importing into the United States, and possessing with intent to distribute, several pounds of cocaine, and with conspiring with one Leon Ovidio Rodriguez, also known as "William", to commit those offenses, in violation of 21 U.S.C. §§ 952(a), 841(a)(1) and 846 and 18 U.S.C. § 2. Appellant was convicted of the conspiracy, importation and possession counts and sentenced to two years imprisonment and a five year special parole term on each count, the sentences to run concurrently. Execution of the sentence was stayed pending appeal. Rodriguez, who

was charged in all four counts, and whose release from custody had been secured by a \$75,000 surety bond, failed to appear at trial, and he remains a fugitive to this day.

Appellant does not challenge the sufficiency of the evidence, but rather claims that statements and other evidence admitted against him at trial were rendered inadmissible by an "unnecessary" delay in bringing him before a magistrate after his arrest.

Statement of Facts

A. The Government's Case

It is undisputed that on Friday, February 25, 1977, at approximately 10:30 P.M., appellant arrived at the Pan American Cargo Facility located at John F. Kennedy International Airport and claimed two shipments of Spanish language newspapers which had arrived earlier on two separate flights from Medellin, Colombia, and which contained several pounds of cocaine. The issue to be resolved on this appeal arises out of the series of events which transpired beginning with appellant's arrest shortly after he claimed the shipments, ~~containing~~^{AMU} through his weekend-long efforts to "assist" the authorities in apprehending the intended recipient of the drugs, and ending with his appearance before the United States Magistrate in the Eastern District on Monday, February 28, 1977. Testimony concerning these events was given by agents of the Drug Enforcement Administration (D.E.A.) both at the pre-trial hearing on appellant's motion to suppress and at trial. Since the facts developed at the suppression hearing were identical to those presented at trial and since it is to the record of the hearing that the Court must look to resolve the issue on appeal, references are to both the record of the suppression

hearing and the trial. References designated "H" are to pages of the transcript of the suppression hearing. References designated "T" are to the trial transcript.

On February 25, 1977, at approximately 11:00 A.M., Pedro Alma, an employee of Pan American Airways, was "off-loading" baggage from Avianco flight No. 1002 which had just arrived at John F. Kennedy Airport from Medellin, Colombia, when he discovered, secreted in the folds of a Spanish language newspaper lying on the floor of the plane, a plastic bag containing white powder. The newspaper, a publication called "El Correo", was part of a two bale shipment of papers which had apparently become unraveled and strewn about the belly of the aircraft. Alma reported his discovery to a co-worker who, in turn, notified the airport authorities. Shortly thereafter, agents of the DEA, and United States Customs ("Customs") arrived at the plane and inspected the remaining newspapers. The search disclosed five more plastic bags containing white powder taped inside other "El Correo" newspapers. A field test of the substance contained in the bales revealed that it was cocaine. The agents learned that still another shipment of "El Correo" was due to arrive that afternoon. When these newspapers arrived, they too were inspected and several more pounds of cocaine, similarly concealed, were found (H. 10, T. 150-151; 154-155; 398-402; 403).

Special Agent John Huber of the DEA questioned several Pan American employees, two of whom testified at trial, about what, if anything, they knew concerning the shipment of these newspapers.¹ Agent Huber learned that two-bale shipments of "El Correo" newspapers had been arriving at the Pan American Cargo Facility for approximately two years and that, in recent months, the

¹ Thomas Quigley (T. 159-174) and John De La Rosa (T. 175-193) testified at the trial.

papers had been picked up each night between 10:30 and 11:00 P.M. by a person these employees referred to as "the old man". The employees described "the old man" as a nervous individual who insisted that he be given a stamped letter to show his boss whenever a particular newspaper shipment failed to arrive. Of all the persons who received shipments of daily newspapers, "the old man" was the only one who accepted papers that were overdue (H. 10, T. 159-174; 175-193).

Huber decided to allow a "controlled delivery" of the newspapers and their contents to the person who had been picking them up. Thereafter, at approximately 10:30 P.M. surveillance agents watched appellant enter the Pan American Cargo Facility and claim and pay an import duty on the newspapers. Agent Huber followed appellant outside the terminal and placed him under arrest as he was loading the newspapers into the trunk of his car (H. 8, T. 403).

Huber then transported appellant to the DEA Office at John F. Kennedy International Airport. Upon arriving there some twenty minutes later, and having already determined that appellant was not fluent in English, he immediately gave appellant a card containing the *Miranda* warnings written in the Spanish language, and asked him to read it. Huber then asked appellant whether or not he understood what was on the card, and appellant indicated that he did (H. 8-9). A few moments later, Philip Lawry, a spanish-speaking employee of Customs, arrived at the DEA office and re-advised appellant of his Constitutional rights in Spanish (H. 11; 18-19). Again appellant indicated that he understood his rights. At this point, DEA Agent William Kennedy asked appellant, through Lawry, whether or not he was willing to answer any questions. Appellant indicated that he was (H. 19). Appellant then proceeded to explain to the agents that

he was employed by a person named Martin Caro² to pick up the "El Correo" newspapers each night and to deliver them to Caro at the intersection of 90th Street and Roosevelt Avenue in Queens, New York. Appellant stated that he received fourteen dollars per night for performing this job (H. 19; 31-32).

At approximately 11:00 P.M., Special Agent James Castillo arrived at the DEA office. Castillo, a Spanish-speaking agent, advised appellant of his *Miranda* rights for a third time. Afterwards, Castillo asked appellant to restate to him what appellant had told Agent Kennedy. Appellant repeated his story, including this time a description of Caro as an hispanic male in his 40's, about 5' 7" tall and with black hair combed back. Appellant insisted that he did not know what was contained in the newspapers. When Agent Castillo asked appellant whether he would be willing to assist the agents in making a controlled delivery of the cocaine, appellant stated that he would be (H. 42-43, T. 210-211).

After having loaded the newspapers in the trunk of appellant's car, the agents allowed appellant, under their surveillance, to drive to Roosevelt Avenue and 90th Street so that appellant could meet with the person that he had described. Appellant and the agents arrived at that intersection at approximately 11:30 P.M. There, they waited for over two hours, but no one approached appellant's car. Finally, Agent Castillo joined appellant

² Pan American employees Quigley and De La Rosa testified that an hispanic male who identified himself as Martin Caro had approached them two years before the incident in question here, and had arranged to receive the "El Correo" newspapers on a daily basis. De La Rosa further testified that a male with a Spanish accent who identified himself as Caro would often call in order to check on his papers. De La Rosa stated that he was certain that the caller was not "the old man" because the caller spoke fluent, though accented English.

in the car. Appellant advised Castillo that he normally waited for Caro for an hour and a half to two hours, and if Caro did not arrive during that time he would take the papers to his (appellant's) apartment and wait for Caro to pick them up. Appellant at this point recommended that he be allowed to go to his apartment, and he invited the agents to accompany him there (H. 45, T. 214).

As it turned out, appellant's apartment was directly across the street from the intersection where appellant and the agents had been awaiting the arrival of Caro. When appellant and the agents arrived at the apartment they found appellant's son, German Gallego, asleep on a day bed. German, a twenty year old Marine, was advised of the situation and he agreed to cooperate with the agents. The agents then routinely secured the apartment; that is, determined whether any other persons besides German were inside. At this point, Agent Huber noticed inside the apartment a box he recognized as one which normally contains a triple beam scale, and an inordinate amount of open and unopened boxes of plastic sandwich bags. These items were later seized pursuant to a search warrant (H. 119-120, T. 413-417).

Approximately fifteen minutes after the group entered the apartment, the phone rang. Appellant, who had previously agreed that Castillo could monitor all incoming calls, allowed the agent to listen in on the same extension. The caller, who spoke in Spanish, asked appellant whether or not he had "the things". Appellant said "yes". The caller asked repeatedly whether everything was alright and appellant answered that it was. The caller even inquired whether appellant had been drinking, to which appellant answered "no". The caller advised appellant that he would see him (H. 316-317, T. 49-51).

About twenty minutes later, a second call came in, this time from a different Spanish-speaking individual. Again Castillo monitored the call and overheard the caller ask whether everything was alright. Appellant answered in the affirmative. Then appellant volunteered to the caller, "the *packages* are here." The caller, in Castillo's judgment, reacted as if he were surprised and asked appellant, "The packages?" to which appellant replied, "Yes, the packages." At this point the caller again asked whether appellant had been drinking; and appellant answered that he had not. The caller asked whether German was at the apartment, and appellant answered that he was. When the caller asked again whether everything was alright, appellant replied, "Yes, I got the packages." The caller in response stated, that they don't call them packages. "What do we call them?" To which appellant responded, "The passengers." After asking again whether everything was alright, the caller ended the conversation (T. 217-220).

Fifteen minutes later, a third call came in from the same caller who had phoned the second time. This time the caller asked "why it had taken appellant so long" to which appellant replied, that his car had broken down. The caller told appellant that he would be coming over (T. 222-224).

Castillo concluded after the second call that there was a strong possibility that appellant had purposefully attempted to tip off the caller that something was amiss by using an incorrect code word, namely "packages". Without expressing his suspicions to appellant, Castillo suggested after the third call came in that if there was another phone call, German should answer. Appellant and his son agreed with this procedure. At about 3:00 A.M. a fourth call was received and answered by German. The caller was the same as had phoned the second and third times. The caller asked German whether everything

was alright and whether anything was the matter with appellant. German, at the direction of Castillo, replied that appellant had been drinking. The caller then asked to speak with appellant. The caller asked appellant to come join "us" for drinks at a place called the "Orquidia." Appellant, again at the direction of the agents, declined the invitation and asked the caller to come to his apartment. The caller pressed appellant again to join him, but failing this, he ended the conversation, saying that he would see appellant. At the conclusion of this phone conversation, appellant informed the agents that he knew the voice of the caller to be that of Martin Caro. He stated further that Caro had a set of keys to the apartment and that on several occasions previously, he had come to pick up the newspapers when he (appellant) was not at home. Appellant gave the agents permission to remain in his apartment until Caro arrived. He reiterated his desire to assist the agents. Indeed, appellant suggested that they all go to the Orquidia but the agents concluded that this would be unwise (H. 54, T. 224).

Several hours later, at 9:30 A.M. on Saturday, February 26th, the agents concluded that it was futile to continue any attempt at a controlled delivery and they advised appellant that they were taking him to be brought before a Magistrate at the Federal Courthouse in Brooklyn. Just as the agents and appellant were about to leave the apartment, the phone rang again. Appellant answered, and the same caller who had participated in all the previous conversations except the first sought more reassurances from appellant that there had been nothing wrong the night before. Appellant told the caller he had not been feeling well. The caller then asked what time appellant would leave for work that afternoon. Appellant replied that he would be leaving at 12:30 P.M. The caller then stated that he would be by to get the "things" from German that afternoon (T. 226).

Appellant agreed to continue assisting the agents in their attempt to make the controlled delivery, but the agents decided that they should get some advice on how to proceed with regard to appellant's arrest. Thus, the agents consulted with the United States Attorney's Office in the Eastern District and were advised that if appellant wished to continue assisting the agents, he would have to execute a written waiver of his right to a speedy appearance before the magistrate. Agent Castillo prepared a written waiver, which he explained to appellant and which appellant signed (H. 58-62, T. 227).

Appellant then agreed to leave his apartment at 12:30 P.M., as if he were going to work, and to join a DEA agent a short distance away. At 12:30 P.M., appellant did as he was instructed, and he remained with an agent until after the arrest of his co-defendants which occurred at about 6:30 P.M. Thereafter, he was transported to the DEA office and then to Metropolitan Correctional Center, where he was lodged until Monday, February 28, 1977, when he was produced at the Eastern District Courthouse before the magistrate.

Meanwhile, back at appellant's apartment the agents waited with German. At approximately 3:00 P.M., the same caller as before called and asked whether appellant had left something for him. German replied in the affirmative and the caller said he would come by. At approximately 5:30 P.M., another call was received from the same caller, who ascertained that German would be out of the house for a period of time and that appellant would not be returning until 11:30 P.M. The caller, who in response to a direct question, stated that he did not have the keys to the apartment, ended the conversation by saying that he would come to the apartment at 9:00 P.M. (T. 228).

At approximately 6:30 P.M., the agents heard a key turning in the locked apartment door. From their hiding

places they observed an individual enter the apartment, approach German Gallego, and engage in a brief conversation. At this point, the agents identified themselves and arrested the individual. After having been advised of his rights, the man identified himself as Rodrigo Paramillo. He stated that he had been sent to the apartment by a person known to him as "William" to check on the newspapers and report back to him. Jaramillo stated that "William" was waiting on a nearby street. The agents received a description of William which was identical to that furnished to them by appellant for Martin Caro. Jaramillo also described William's automobile and clothing. Agents inside the apartment transmitted over their radio the description of the car and individual to agents who were on surveillance outside the apartment building. Moments later, the phone rang again. German answered and then beckoned to Jaramillo to take the phone. Jaramillo told the caller that the newspapers were in the apartment. At this point, Agent Bill Cipriano radioed agents outside that the individual they were looking for was now on the phone. Surveillance agents outside, shortly after spotting the vehicle that had been described, saw an individual, fitting the description they had received, talking at a pay phone on a nearby street. As soon as Jaramillo concluded his conversation with William, Cipriano radioed the surveillance agents. These agents noted that the individual at the pay phone hung up simultaneously with their receipt of the message that the conversation had ended (T. 368-373; 392-395).

Jaramillo was permitted to leave the apartment under the surveillance of the agents. When he had walked a short distance, the individual who had been observed on the phone beckoned to him. They met, and they were taken into custody (T. 374).

Upon his arrest, Jaramillo surrendered to the agents the keys with which he had opened appellant's apartment. The key ring that Jaramillo possessed was of the kind

which is joined by means of a plug and socket type device into a matching key ring. The matching key ring was found on "William's" person after his arrest. In addition, "William" had on his person a restaurant check on which was written appellant's home address, telephone number, and place of employment. "William" was later identified as Leon Ovidio Rodriguez (T. 374-375).

Jaramillo later took the agents to a rooming house located at 132-45 41st Road where he had stayed as a guest of Rodriguez. Jaramillo directed the agents to a closet where he showed them approximately one-half kilogram of cocaine which was given to him by Rodriguez for safekeeping. At a later time, pursuant to a search warrant, agents seized a number of items from the rooming house, including a letter of the type previously described by the Pan American employee Quigley; that is, a note on Pan American stationery, time stamped, indicating that the newspapers had not arrived at John F. Kennedy Airport. In addition, the agents also found an airline ticket in the name of William Leon Rodriguez, an envelope with the same name typewritten on the front, and several copies of "El Correo" (T. 376-380).³

Jaramillo testified at trial that he had been hired as a driver for Rodriguez and that Rodriguez had brought him up with him from Miami, Florida, about three weeks before his arrest. He admitted that he had become aware of the nature of Rodriguez' business several days before his arrest. Indeed, he stated that on the Tuesday preceding his arrest, he had accompanied Rodriguez and a person known to him as "Jairo" to appellant's apartment. There, he observed Jairo and Rodriguez hovering over plastic bags of cocaine and a scale which were on the

³ Appellant does not challenge the sufficiency of the Search Warrant obtained, but rather claims that any evidence developed later than six hours after appellant's should not have been admitted at trial.

kitchen table next to stacks of "El Correo" newspapers, while appellant stood in the doorway of the kitchen looking on (T. 285-293).

As already mentioned, Agent Huber secured a search warrant for appellant's apartment. Among other things, he seized a box containing a triple beam balance scale, a large number of boxes of plastic "baggies," two address books, and several telephone bills for recent month's charges. An investigation disclosed, and Agent Huber so testified, that one of the telephone numbers dialed from appellant's phone belonged to a telephone located at the Miami address of Leon Ovidio Rodriguez which Huber obtained from Rodriguez along with other personal history information. Huber also indicated that a check with the telephone company revealed that several calls were made from Rodriguez's Miami home to appellant's apartment. In addition, one of the address books contained the notation "W-939-9789". Huber's investigation disclosed that this phone number was located at 144-31 41st Avenue, Apartment 1-F, and was listed to an Ivan Echevarria. The superintendent of that apartment building testified and identified a picture of Leon Ovidio Rodriguez as the person who had rented apartment 1-F in the name of Ivan Echevarria. In a subsequent search of that abandoned apartment (Apartment 1-F) agents found a piece of stationery, identical to the United States Marine Corp stationery which Castillo obtained from United States Marine German Gallego and upon which the waiver of speedy arraignment was set forth and signed. Written on that stationery was the telephone number of Pan American Cargo.

B. The Defense Case

Aside from two character witnesses, appellant's defense consisted entirely of his own testimony. His testimony repeated much of what he testified to at the sup-

pression hearing. That testimony was remarkable for its studied avoidance of any remark remotely inculpatory of the fugitive co-defendant Leon Ovidio Rodriguez, also known as "William".

The defendant testified that he was approached in the street by the person who introduced himself as Martin Caro, and that Caro had offered him the job of picking up newspapers at Kennedy Airport (T. 445-447). Appellant insisted that he never knew what was concealed inside the newspapers and that he received \$14 per week to pick up and deliver them. He also stated that he had given Caro keys to his apartment so that when necessary he could retrieve the newspapers when appellant was not at home. Appellant stated unequivocally that he had been willing to cooperate with the agents and assist them in the capture of Martin Caro or anyone else involved in the crime for which he was charged (T. 458). Appellant further stated that he had suggested to the agents that they come up to his apartment to wait for Martin Caro (T. 459).

On cross-examination, appellant admitted that on his direct examination, when he described the job he performed for Caro, he always characterized the things he was to pick up as "los periodicos," newspapers, and not "pasajeros", passengers, or "paquetes", packages, as he had during the phone conversation of February 25th and 26th. He claimed that the voice on the telephone during those calls was not the voice of Martin Caro. Of course, Agent Castillo had previously testified that appellant had specifically identified the caller (on all but the first call) as Martin Caro. When he was shown a photograph of the co-defendant, Leon Ovidio Rodriguez, he denied that he was the person to whom he delivered the newspapers, namely Martin Caro. Appellant admitted that when he was confronted with Rodriguez at the DEA office on February 26th, he advised the agents that this man was

not Martin Caro. When asked to describe Martin Caro, appellant stated that Caro was very tall and that he had *white* hair. Castillo had previously testified that on February 25th, shortly after appellant's arrest, appellant had described Caro as a short (5' 7") hispanic man with *black* hair combed back (T. 570; 574).

When appellant was asked whether he knew the person depicted in the photograph, Leon Ovidio Rodriguez, he said he only knew him well enough to say hello or goodbye on the street. This was in spite of Agent Huber's testimony regarding the phone records and other documentary exhibits linking appellant with Rodriguez (T. 577).

Appellant was willing to admit that on one occasion Jaramillo had come to his apartment, but he claimed that he was accompanied by the person known as Jairo only, and he insisted that the Rodriguez had not been there also (T. 572).

ARGUMENT

Neither Appellant's Statements Nor Any Other Evidence Developed After Appellant's Arrest Was The Product Of Unnecessary Pre-Arrest Delay.

Appellant does not claim that statements made by him to agents after his arrest were involuntary. Indeed, counsel for appellant admitted at the pre-trial hearing below that appellant's statements were undoubtedly voluntary (H. 493). Appellant argues, however, that notwithstanding the voluntariness of his statements, they should have been excluded because of an alleged inordinate delay in bringing him before the magistrate *after* the statements were made. Appellant further argues that *any* evidence developed later than six hours after his arrest should have been excluded as the fruit of the

delay. Conspicuously absent from appellant's brief is any mention of the waiver of speedy arraignment, written in appellant's native language, which appellant executed on the morning following his arrest.⁴

With the enactment of Title 18, United States Code, Section 3501, it can no longer be said "that unnecessary delay in arraignment is sufficient in and of itself to require exclusion of a confession. Rather, the test would seem to be the voluntariness of a confession under all the circumstances". *United States v. Collins*, 462 F.2d 792, 796 (2d Cir. 1972), *cert. denied*, 409 U.S. 988 (1972). And while Section 3501(c) provides that a confession made within six hours of arrest, absent a showing of involuntariness, is admissible, "the converse that a longer delay *ipso facto* precludes admissibility has not been found to be intended by the legislature". *Government of the Virgin Islands v. Berry*, 385 F. Supp. 134 (1974). See also, *United States v. Marrero*, 450 F.2d 373, 378 (2d Cir. 1971). Any delay between arrest and confession or arrest and arraignment is but an additional factor to be weighed by the judge in

⁴ As noted above, appellant never made a confession upon his arrest, but, he did give an exculpatory statement and, of course, during the period between his arrest on Friday and his appearance before the magistrate on Monday he made various statements to the agents in the course of his cooperation. It appears that on appeal appellant in deeming that all of these statements should have been suppressed.

The other evidence whose admission appellant presumably attacks are the items recovered from his apartment pursuant to a search warrant on February 28, 1977 (the triple beam scale, plastic bags, address book and telephone bills) two of which items were observed by the agents on the night of February 25th; items recovered from the Rodriguez apartment (two piece of ~~Marcie~~ ^{SP} ~~Conn~~ stationary bearing the number of Pan American Cargo at Kennedy Airport; and the testimony of the accomplice Jaramillo.

determining voluntariness and is not determinative by itself *United States v. Marrero, supra*.⁵

In the case at bar, appellant concedes the voluntariness of his statements. It appears, therefore, that even if the delay in bringing appellant before a magistrate were found to be "unnecessary", the trial judge could properly admit his statements since they were undoubtedly voluntary. However, we submit that there was no "unnecessary" delay so as to require suppression of the statements and evidence developed after appellant's arrest.

The critical period for determining whether the *Malloy* exclusionary rule should apply is the time between the arrest and the statement. Even illegal detention after a statement is made will not affect its admissibility. *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970); *United States v. Keeble*, 459 F.2d 757 (8th Cir. 1972), *rev'd on other grounds*, 412 U.S. 205 (1973).

The uncontroverted testimony at the pre-trial hearing and at trial disclosed that appellant began making statements to the DEA agents within less than one half hour of his arrest. Certainly, appellant cannot argue that the

⁵ Title 18, United States Code, Section 3501(c) provides, in pertinent part, as follows:

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention. . . .

time it took to transport appellant from the scene of his arrest to the DEA office, and to give appellant his *Miranda* warnings, constituted an unreasonable delay. And, of course, the time it took for appellant to relate his story to the agents cannot be considered an unnecessary delay. *United States v. Curry*, 358 F.2d 904, 913 (2d Cir. 1966), *cert. denied*, 385 U.S. 873 (1966). *Muschette v. United States*, 322 F.2d 389 (D.C. Cir. 1963), *vacated on other grounds*, 378 U.S. 569 (1964).

Similarly, the time period beginning with the conclusion of appellant's statements at the DEA office on February 25th and ending with his lodging at the Metropolitan Correctional Center on the evening of February 26th, was not an "unnecessary" delay. In *United States v. Vita*, 294 F.2d 524, 533 (2d Cir. 1961), the court held that a delay which arises out of a need "for investigation rather than mere repetitious interrogation will 'warrant a detention that is more than brief.'" In *United States v. Hall*, 348 F.2d 873, 842 (2d Cir.), *cert. denied*, 382 U.S. 947 (1965), the court held, in a case analogous to the one at bar, that delay for the purpose of recovering stolen goods with the accused's assistance was both "necessary" and "investigatory" where the accused's arrest and arraignment might otherwise have alerted his unarrested confederate to "make away with the remaining loot [bearer bears]". Certainly, in the case at bar, the delay was occasioned by the need to apprehend appellant's unsuspecting accomplices, and again there is no doubt that appellant lent his assistance voluntarily and indeed encouraged the agents to continue. Moreover, on the critical weekend at issue here, it may have appeared to the agents that appellant's exculpatory statements were plausible, and it has been held that a delay to give an accused a chance to have his story verified is not unnecessary. *United States v. Hall, supra*, 348 F.2d 837; *United States v. Middleton*, 344 F.2d 78 (2d Cir. 1965).

Regarding the period between appellant's lodging at Metropolitan Correctional Center on Saturday evening February 26th and his appearance on Monday, February 28th, the cases make it plain that overnight detention occasioned by the unavailability of a committing magistrate where the arrest occurs at a late hour or after the beginning of a weekend or holiday is reasonable. *United States v. Ortega*, 471 F.2d 1350 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States v. Collins*, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972); *United States v. Marrero*, *supra*, 450 F.2d 373; *United States v. Vita*, *supra*, 294 F.2d 524.⁶

Lastly, but most importantly, appellant on Saturday morning, February 26, 1977, having been advised that he could be taken immediately before a magistrate to be arraigned, executed a written waiver of his right to a speedy arraignment. Appellant does not contest the voluntariness of that waiver; indeed, the waiver is not mentioned in his brief. Although counsel for appellant hinted at the hearing below that a voluntary waiver would be impossible since appellant's will would be necessarily overborne by the presence of the agents, there was more than enough evidence in the record from which to conclude that appellant not only voluntarily, but eagerly waived his speedy arraignment right in order to continue his attempt to put himself in the most favorable light. There is no doubt that the right to a speedy appearance before the magistrate is one that can be waived. In *United States v. Woods*, 468 F.2d 1024 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972) the court held that where a defendant waives his *Miranda* rights, he waives the *Mallory* right to be brought before a magistrate as quickly

⁶ In his brief, appellant asserts that he could have been brought before the magistrate on Sunday, but in the Eastern District the magistrate is only available for weekend duty on Saturday morning.

as possible as well.⁷ See also *United States v. Cluchette*, 465 F.2d 749 (9th Cir. 1972); *Frazier v. United States*, 419 F.2d 1161 (D.C. Cir. 1969); *United States v. Lopez*, 450 F.2d 169 (9th Cir. 1971). In the case at bar, appellant did merely waive his *Miranda* rights in general. He specifically waived his right to a speedy arraignment. There can be no doubt that the waiver was effective.

The principal case upon which appellant relies is distinguishable. *United States v. Klapholz*, 230 F.2d 494 (2d Cir. 1956), was decided before the enactment of Section 3501, which, as has been stated above, modified the *McNabb-Mallory* rule. The Court in *Klapholz* specifically rested its decision to exclude confessions and other evidence obtained during a period of delay prior to appearance before a magistrate on the notion that unnecessary delay in arraigning a defendant in and of itself rendered all such evidence inadmissible. Of course, that is no longer the law. Voluntariness is now the paramount issue. See *United States v. Collins*, *supra*. And appellant is in a better position with respect to other items of evidence which were arguably derived as a result of the delay in arraigning appellant. Where, as in the case at bar, evidence is developed with the voluntary assistance of the accused (indeed, in our case at the insistence of the accused), it logically follows that such evidence should be received just as a voluntary confession would be. It should also be noted that the *Klapholz* decision rested in part on the court's refusal to infer a waiver of Rule

⁷ Appellant claims that the trial judge based his ruling on the assumption that "all statements and inculpatory evidence was obtained during the first six hours of arrest." This was clearly not the case. After making inquiry of Government counsel and determining that there was some uncertainty regarding the time period involved, Judge Mishler specifically rested his decision to admit all statements and physical evidence on the effective waiver of speedy arraignment executed by appellant, citing *United States v. Woods*, *supra*. (H. 104-106).

5(a) requirements from the "bare consent" of the defendants to the presence of the agents in their home. *Id.* at 498. In the case at bar, the defendant *invited* the agents into his home for the very purpose of developing evidence against the intended recipient of the narcotics.

Thus appellant's claim is without merit. Both his statements and the evidence developed after his arrest were properly admitted at trial.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of October 1977 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

L.A. Tirelli

52 South Main St.

Spring Valley, N.Y. 10977

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East
Washington Street, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

14th day of October 1977

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979